IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 343 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

AND

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? :

3. Whether Their Lordships wish to see the fair copy of the judgement? :

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? :

5. Whether it is to be circulated to the Civil Judge? :

REMNIHOR BHAGALU

Versus

STATE OF GUJARAT

Appearance:

MR SAURIN A SHAH for the appellant.

Mr. B.D. Desai, APP for Respondent State.

CORAM : MR.JUSTICE H.R.SHELAT and MR.JUSTICE J.R. VORA

Date of decision: 16/02/2000

ORAL JUDGEMENT (Per: H.R. Shelat, J.)

This appeal is directed against the judgment and

order dated 25th March 1994 passed by the then learned Additional Sessions Judge, Bulsar at Navsari, in Sessions Case No. 59 of 1989 on his file, convicting the appellant of the offence punishable under Section 20(b)(ii) of The Narcotic Drugs and Psychotropic Substances Act (for short the `NDPS Act') and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1,00,000/=, in default rigorous imprisonment for one year more.

2. Tersely put and shorn of unnecessary details, the case of the prosecution is that on receipt of the information on 4th November 1988, Pitambardas Virumal Asnani, the then Police Inspector of Bulsar City police station arranged for raiding the house, used, occupied and in possession of the appellant. The panchas were called and they were apprised of the purpose. The Police Inspector with panchas and the members of the raiding party left for Mograwadi, Nr. Railway garnala in a jeep where the house in possession of the appellant is situated. Going near the house of the appellant they shouted his name, pursuant to which appellant came out and on being questioned he replied that his name was "Ram Nihor Bhagalu". The Police Inspector then realised that he had reached the correct place as per the information. After undergoing necessary formalities, the Police Officer along with the panchas and members of the raiding party took the search entering into the house. Near the Cot certain things were lying. One of such things was a black coloured tin box. The same was opened wherefrom the lumps of charas were found, and in another tin box a plastic bag was kept wherefrom one lump of opium was found. The same were weighed. The appellant was not having any pass or permit to possess the same. The Police Inspector could judge that the offence punishable under Section 20(b)(ii) of the NDPS Act was committed by the appellant. He therefore arrested the appellant and took him to the police station where the FIR was lodged. He then carried out rest of the investigation and filed the chargesheet in the Court of the Judicial Magistrate (F.C.) at Bulsar. As the learned J.M.F.C., Bulsar, was having no jurisdiction to try the case, the same was committed to the Court of Sessions at Navsari which came to be registered as Sessions Case No. 59 of 1989. The same was assigned to the then learned Additional Sessions Judge, Navsari, holding his sitting at Bulsar also. He framed the charge at Ex.1 to which the appellant pleaded not guilty. The prosecution then led necessary evidence. Appreciating the evidence before him, the learned Additional Sessions Judge reached the conclusion that the prosecution had beyond reasonable doubt succeeded in

establishing the charge. He therefore held the appellant guilty and convicted and sentenced him as aforesaid. It is against that order of conviction and sentence, the present appeal is filed.

3. The learned advocate representing the appellant assails the judgment and order on several grounds, but after the query was made he tapered of his submission confining to the only contention going to the root of the case. According to him, the mandatory provision of Section 41 (2) of the NDPS Act was not complied with though it was obligatory on the part of the Investigating Officer to reduce the information he received in writing and then forward the same to his higher authority. In the case on hand, when the breach of that mandatory provision was committed, the trial was vitiated and conviction and sentence inflicted are not tenable.

4. In reply to such contention, Mr. B.D. Desai, the learned APP, has tried his best to convince us that there is in fact no breach of the provision of Section 42 of the NDPS Act,but failed. If at all there is any breach the same would not vitiate the trial because thereby no prejudice is caused to the appellant, is his submission in the alternative.

5. The contention raised by the learned advocate for the appellant cannot be brushed aside lightly. Section 41 (2) of the NDPS Act lays down that the officer of the gazetted rank of the State Government if has a reason to believe from personal knowledge, or information given by any person and taken in writing that a person has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed, he has to reduce the information received into writing. Whether such duty which is cast on the officer is obligatory and the breach thereof would vitiate the trial is a question posed before us for consideration. A similar question arose before the Supreme Court in the case of State of Punjab v. Balbir Singh - 1994 Supreme Court Cases (Cri.) 634 = AIR 1994 S.C. 1872, wherein discussing at length regarding Section 41 & 42 of the NDPS Act, it is made clear that the provisions make it obligatory that the officer referred to in the Section on receiving the information must reduce the same to writing and also record the reasons for the belief while carrying out the arrest or search as provided under the provisions of Section 42 (1) of NDPS Act. To that extent the provisions are mandatory. Consequently, failure to comply with these requirements affects the prosecution

case and vitiate the trial. In view of such clear observation of the Apex Court, in this case if the provision of Section 41 (2) of NDPS Act is not complied with, the same would certainly vitiate the trial.

6. The Police Inspector is examined at Ex. 6. During his cross-examination in Para 5, he has in clear terms made it clear that whatever information he received was not reduced into writing, and further made it clear that there was no such practice. His such clear admission shows that mandatory provision of Section 41(2) of the NDPS Act is set at naught. When the same is not complied with, in view of the decision of the Supreme Court, the conviction and sentence inflicted are not tenable. As the trial is vitiated the same are required to be set aside and the accused on that count is entitled to acquittal.

7. For the aforesaid reason, the appeal is required to be allowed. The same is allowed accordingly. The conviction and sentence, inflicted on the appellant, in connection with the above stated offence, by the then learned Additional Sessions Judge, Bulsar at Navsari, are hereby quashed and set aside, and the appellant is hereby acquitted of the charges levelled against him. At present, the appellant is on bail. His bail bonds stand cancelled.

8. While releasing the appellant on bail, this Court directed him to deposit Rs. 2,000/- with the office of this Court. The Office is, therefore, directed to refund the said amount to the appellant.

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